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## NOTE AND COMMENT.

WHAT IS A PUBLIC PURPOSE JUSTIFYING THE EXPENDITURE THEREFOR OF MONEY RAISED FROM TAXATION.—A recent Ohio case raises a question which is frequently discussed in connection with the activities of cities, i. e., what is a municipal or public purpose for the accomplishment of which city funds raised from taxation may be expended. The council of the city of Toledo passed an ordinance authorizing the expenditure of $1,000 for the purpose of establishing a municipal moving-picture theater. The auditor refused to pay over to the director of public service the fund thus appropriated and mandamus was sought by the city to compel him to do so. The auditor gave as the reasons for his refusal (1) that the provision of the Constitution relating to local government for municipalities was not then effective in Toledo and (2) that neither the Constitution nor the statutes of Ohio gave authority to municipalities to establish a moving-picture theater. *State ex rel. City of Toledo* v. *Lynch* (Ohio 1913), 102 N. E. 670.

The case is of general interest because of the question arising out of the second reason given by the auditor for his refusal to act, i. e., Does the

authority to exercise all the powers of local self-government authorize taxation to establish and maintain a municipal moving-picture theater? and by reason of the question discussed by the justices as collateral to this, i. e., Is a municipal moving-picture theater a public purpose?

In the majority opinion, written by Chief Justice SHAUCK, it is reasoned that a moving-picture theater is not a public purpose justifying the expenditure, in its establishment and maintenance, of funds raised by taxation; that the state itself cannot expend public moneys for such a purpose, and that as the municipalities get their powers from the state, it cannot be supposed that the makers of the new constitution of Ohio intended by the provision, "Municipalities shall have authority to exercise all powers of local self-government," to give cities power to expend public funds to establish a municipal moving-picture theater, which is not a public purpose. Justice NEWMAN concurred in this opinion and in the judgment denying the writ of mandamus. Justice JOHNSON concurred in the judgment, but not in that part of the majority opinion which declares a municipal moving-picture theater not to be a public purpose. Justice WILKIN concurred in the judgment, but wrote a separate opinion in which he concluded that the ordinance in question contemplated a moving-picture theater to be owned and operated for profit and for this reason was not a public purpose. Justice DONAHUE, who concurred in the judgment, dissented from the reasons given therefor in the majority opinion and indicated his belief that a moving-picture theater for the purpose of promoting the "education and patriotism of the citizens generally, and to advance the understanding and appreciation of the individual civic responsibilities of each citizen" is a public purpose for purposes of taxation. Justice WANAMAKER, who dissented from both the judgment and the opinion of the majority, argued that the municipal moving-picture theater in this case is a proper governmental purpose for the city even though it might not be such for the state, because while the powers of the state government are all powers delegated by the people and consequently if no clause in the constitution delegates the power to expend public money for a particular purpose the state government has no such power, the powers of the municipalities are inherent and as to their powers the constitution is merely a limitation and if no clause in the constitution takes away from cities the power to expend money for municipal theaters they have that power.

At this time, when the highest courts of practically every state have adopted as the settled doctrine the rule that state constitutions are limitations rather than delegations of power, it seems strange, indeed, to find a judge selecting for his premise the principle that the constitution of a state constitutes a delegation of power. There is, however, Ohio authority for this principle, *Railroad Company* v. *Commissioners of Clinton County* (1852) 1 Ohio St. 77, 84, though the almost universal holding is contra. *State* v. *Osborne* (Arizona, 1912), 125 Pac. 884; *State* v. *Cochrane* (1909), 55 Ore. 157, 179, 105 Pac. 884; *Ensley Development Co.* v. *Powell* (1906), 147 Ala. 300, 40 So. 137; *Harris* v. *Bond & Mortgage Co.* (1912), 244 Mo. 664, 687, 144 S. W. 603; *McGrew* v. *Missouri Pacific Ry. Co.* (1910), 230 Mo. 496, 132 S. W. 1076; *Munn* v. *Illinois* (1876), 94 U. S. 113, 24 L. Ed. 77; *City of Chicago*

v. *Hotel Co.* (1911), 248 Ill. 264, 93 N. E. 753. Another assumption which Justice WANAMAKER used as a basis of his argument, i. e., that the constitution is simply a limitation as to the powers of cities, is opposed to the uniform opinion of the courts. It is practically undisputed by the courts that a city has no powers except those expressly granted or implied in, or incident to, powers expressly granted or such as are indispensible to the very life of the municipal corporation. *Ottawa* v. *Corey* (1882), 108 U. S. 110, 121; *Barnett* v. *Denison* (1891), 145 U. S. 135, 139; *Ravenna* v. *Pennsylvania Co.* (1887), 45 Ohio St. 118; *Bell* v. *City of Platteville* (1888), 71 Wis. 139. Undoubtedly power may be conferred on a city by the constitution as well as by statute, but outside of a very few powers which are indispensible to the very existence of the corporation, the city has no power unless it can point to a statute or a clause of the constitution expressly or impliedly granting the same.

The broad conclusion of the majority opinion that the establishment and maintenance of a moving-picture theater is not a public purpose, though undoubtedly in accord with the majority of the decisions in this country on the general question of what constitutes a public purpose, is about as unsatisfying as the principles stated by Justice WANAMAKER are mistaken. No satisfactory definition of a public purpose that will fit all the cases in which the courts usually find the purpose to justify taxation for its accomplishment has ever been framed. The rule laid down by Justice COOLEY in *People* v. *Salem* (1870), 20 Mich. 452, that the term is merely one of classification "to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest or liberality" is unsatisfactory because it practically prohibits the growth of municipal and state activities without a constitutional amendment allowing new activities. If this rule had been strictly followed cities in the majority of our states very likely would still be unable to own and operate water, light and power plants and street railways. There seems also to be no satisfactory reason for drawing the line dividing those activities allowed from those prohibited between those which have an easement in the public streets and thoroughfares to lay pipes, stretch wires, etc., and those which do not, as has been done in a recent case. 2 NAT. MUN. REV. 339. In *People* v. *Salem,* supra, it was said that "the term 'public purposes,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow." This principle, however, has not been assented to by some courts. *Opinion of the Justices* (1903), 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592. In this instance the court indicated its opinion to be that if there were a fuel famine and a great public need which could not be supplied by private enterprise, the city might purchase fuel and sell it to its citizens.

So long as the term "public purpose" is not satisfactorily defined we may expect the conflicting and unsatisfying results that we have at present in this country to continue. These may be minimized, however, if the courts will keep in mind and conscientiously apply two principles concerning which there is no disagreement, i. e., (1) that within reasonable limits the legislative body is the judge of what constitutes a public purpose and that their

decision ought not to be overthrown except in a very clear case, and (2) that the question before the court in each instance is the question of legislative power and not of legislative policy. *Beach* v. *Bradstreet* (1912), 85 Conn. 344. In too many recent instances courts seem to have been largely influenced to decide against allowing a new city or state enterprise by the fact that in their personal opinion it would have been bad policy for the city or state to undertake it. Courts will do well to remember also that the present century is more socialistic in its tendencies than the last, and that consequently cities and states will be expected to undertake more activities than they have in the past. The term "public purpose," either as an expressed term of the constitution or as an implied limit on the power of taxation, is a broad term, and like other constitutional terms of the same nature its interpretation ought to change with the spirit of the age. G. S.

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REMOVAL TO FEDERAL COURTS OF CASES AGAINST INTERSTATE CARRIERS FOR DAMAGE TO SHIPMENTS.—A novel, and, at first sight, a startling decision was handed down by the District Court of the United States for the District of North Dakota, in the case of *McGoon* v. *Northern Pacific Railway Company,* 204 Fed. 998.

That was a suit begun in a state court by a shipper against a railroad company to recover damages for injury to property while being transported from one state to another, the *ad damnum* clause as laid in the complaint being less than $3,000.00. Upon motion to remand the cause, upon its removal to the federal district court, the opinion in the above case was written.

This would seem to be a case of first impression upon the precise question, and it is strange indeed that this question had not before been passed upon. The court held that, although the allegations of the defendant's liability were not based, in words, upon § 20 of the Interstate Commerce Act, as amended by the Act of June 29, 1906, nevertheless the plaintiff's action was, in point of fact, based upon that section, for, said the Court: "That section abrogates all state and common law liabilities on interstate shipments." For this statement the Court relies upon the decision of the Supreme Court in the case of *Adams Express Company* v. *Croninger,* 226 U. S. 491. The language used by the District Court is, however, much stronger than that used in the *Croninger* case, but, upon a careful reading of the *Croninger* case, it is believed that its effect is as indicated in the *McGoon* case, and also to the same effect may be quoted the language of Judge Lurton as used in the case of *Kansas City Southern Railway Company* v. *Carl,* 227 U. S. 639, especially on pages 648 and 649.

The sole question it would seem to determine is—does the statute referred to abolish, in truth, all common law liabilities on interstate shipments, as well as all state statutes and regulations upon the subject,—and it is believed that such must be the effect of the Act, for, if there can be any divided authority over interstate commerce, and Congress has acted as it has by passing the Interstate Commerce Act, the jurisdiction thereupon has become vested exclusively in the federal courts, for, if the different state courts retain their